Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules: Regulatory Access Charge Reform and Price Cap Performance Review for Local Exchange Carriers	)	RM 9210
Access Charge Reform	)	CC Docket 96-262
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
End User Common Line Charges	)	CC Docket No. 95-72

COMMENTS OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, and pursuant to the Commission's Public Notice dated December 31, 1997 (No. 81156), hereby comments in support of the *CFA Petition*.[1]

I. SUMMARY

The *CFA Petition* makes a simple request: initiate a rulemaking to require immediate prescription of interstate switched access rates to cost-based levels.[2] CompTel submits more particularly that, with the exception of non-tandem switched originating access and direct trunked transport, the Commission should immediately prescribe rates for interstate access

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[1] Petition for Rulemaking filed by the Consumer Federation of America, the International Communications Association, and the National Retail Federation on December 9, 1997.

[2] *CFA Petition* at 3.

commensurate with those applicable to unbundled network elements ("UNEs"), as established through State commission arbitrations and costing proceedings provided the State regulators relied on a total service or total element long run incremental cost ("TSLRIC/TELRIC") methodology acceptable to the Commission. In the absence of rates established in this way, the Commission should set rates at the default proxy levels it adopted in the *Local Competition Order*[3] or conduct a rate prescription proceeding. Without appropriate affirmative action by the FCC, access charges are unlikely to move toward economic levels. As explained in more detail below, CompTel submits that the additional reform urged by the *CFA Petition* is required even if the U.S. Supreme Court ultimately reinstates the rules regarding the availability of pre-existing combinations of UNEs adopted by the Commission in its *Local Competition Order*, but vacated by the U.S. Court of Appeals for the Eighth Circuit in *Iowa Utilities Board.*

Regarding non-tandem switched originating access and direct trunked transport charges, the Commission should consider the impact the timing of the Supreme Court decision may have on the emergence of market forces that could bring non-tandem switched originating access and direct trunked transport to forward-looking cost levels. In the event the Eighth Circuit decision on pre-existing combinations is upheld, the Commission should immediately prescribe rates for non-tandem switched originating access and direct trunked

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 ("Local Competition Order"), *Order on Reconsideration*, 11 FCC Rcd 13042, *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *Third Reconsideration Order,* FCC 97-295 (Aug. 18, 1997), *further recon. pending, aff'd in part and vacated in part sub nom. CompTel v. FCC*, 117 F.3d 1068 (8th Cir.) *(CompTel), aff'd in part and vacated in part sub nom. Iowa Utilities Bd. v. FCC and consolidated cases*, No. 96-3321 et al., 1997 WL 403401 (8th Cir., Jul. 18), *modified on rehearing*, slip op. (8th Cir. Oct. 14, 1997)("Iowa Utilities Bd.") *cert granted sub nom. AT&T v. Iowa Utilities Board*, No. 97-826 *et al.*(S.Ct. Jan. 26, 1998).

transport in the same manner as CompTel proposes that terminating and tandem switched access charges be set.

II. INTRODUCTION

CompTel is an industry association representing providers of competitive telecommunications services, with over 200 members ranging in size from large nationwide carriers to smaller regional service providers. Because CompTel's member companies are among the largest purchasers of ILEC access services, CompTel is critically concerned that access charges be nondiscriminatory and cost-based. In light of this concern, CompTel has been an active participant in the Commission's proceedings involving implementation of the local competition provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98), the restructuring of ILEC switched transport rates (CC Docket No. 91-213), the reform of universal service rules and charges (CC Docket No. 96-215), and the reform of access charges (CC Docket No. 96-262).

To date, nearly two years after the passage of the 1996 Act and nine months after the *Access Charge Reform Order*, it is clear that the Commission's desire to rely upon market forces to reduce access charges to cost-based levels is not going to yield appreciable results for a long time, if ever. Competitors relying upon their own facilities have made marginal inroads in local markets, at best, and have produced *no* effective competitive provision of switched access services, *i.e.*, where an interexchange carrier has the ability to purchase originating or terminating access to particular end users from multiple providers. Moreover, the recent decisions of the U.S. Court of Appeals for the Eighth Circuit have made it extremely problematic for any carrier to broadly serve the local exchange and exchange access market using UNEs, thereby obviating the need to purchase interstate access and

creating the prospect for exchange access competition. Accordingly, only by prescribing rates at economically efficient levels as proposed by CompTel herein can the Commission *ensure* that access charges are reasonable and nondiscriminatory, and allow competitive carriers to design their networks and develop their services in ways that respond to customer needs and rational market signals.

III. THE DECISIONS OF THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT UNDERMINE THE PREDICATE FOR THE COMMISSION'S APPROACH TO ACCESS CHARGE PRICING BUT NOT THE NEED TO DRIVE ACCESS CHARGES TO COST

A. Introduction: The Decisions of the Eighth Circuit and Their Effect on the FCC's Market-Based Approach to Access Reform

The Commission made plain in its *Access Charge Reform Order* in CC Docket No. 96-262 that access charges should move from their current inflated levels to forward-looking, efficiently incurred cost-based levels.[4] The Commission, in undertaking access reform, looked to market forces — principally through the availability of UNEs to competitive local exchange carriers ("CLECs") — as the vehicle to drive access charges to such levels.[5] However, since the FCC issued its *Access Charge Reform Order*, the U.S. Court of Appeals for the Eighth Circuit has released several opinions upon review of the *Local Competition Order*. The Court's opinions directly undermined the FCC regulations upon which the FCC depended for its market-based approach to bring access charges to economic levels.

Most importantly, the Court invalidated the Commission rule requiring ILECs to offer to requesting telecommunications carriers access to UNEs in preexisting combinations. By

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[4] *Access Charge Reform*, First Report and Order, CC Docket No. 92-262, FCC 97-158, ¶ 337 (May 16, 1997)(subsequent history omitted).

[5] *Id.*

doing so, the Court severely hampered the use of UNEs as a means for introducing wide-scale local exchange and exchange access competition.

Under the Eighth Circuit's rulings on UNE combinations under Section 251(c)(3) of the 1996 Act, requesting carriers may not obtain preexisting combinations of UNEs but must recombine such network elements themselves.[6] The result of this ruling is that ILECs must provide a nondiscriminatory means for UNE combinations that does not force the requesting telecommunications carrier to use its own facilities to achieve the combinations. To date, as the *CFA Petition* notes, none of the ILECs has met this standard.[7] In short, the practical impact of the Eighth Circuit's decision has been to undermine the source of prospective competition in the local exchange and exchange access markets.[8]

At bottom, the Commission was relying upon the emergence of local exchange competition through implementation of Section 251(c)(3) of the Act to create the necessary

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[6] The Eighth Circuit also vacated the Commission's unbundled network element pricing rules in *Iowa Utilities Board*. Fortunately, to date, virtually all State commissions that have been asked to set rates for unbundled network elements have required ILECs, either in arbitrations or through consolidated costing proceedings, to develop prices for unbundled network elements based on forward-looking cost methodologies. Thus, for now at least, the results appear largely consistent, in principle, to those envisioned by the FCC in its *Local Competition Order*. They reflect an understanding by the states that unbundled network elements should reflect recovery only of forward-looking, efficiently incurred costs (plus a reasonable profit).

[7] *See CFA Petition* at 7.

[8] Some competitive carriers obtained access to preexisting combinations of ILEC UNEs on a voluntary basis in negotiated interconnection agreements (or portions thereof) entered into prior to the Eighth Circuit's decisions. Others did not, and are finding the ILECs will not grant such rights in the wake of the Court's decision. Further, many ILECs that voluntarily granted new competitors access to preexisting combinations are now seeking to have State commissions or the courts revise the agreements retroactively in light of the Eighth Circuit's decision, despite the arrangements' voluntary nature. Similarly, and disturbingly, some ILECs are also refusing to allow requesting carriers to adopt approved interconnection agreements under Section 252(i), even in their entirety, when those agreements contain rights to purchase existing combinations.

market forces to lower access charges.[9] The availability of UNEs which provide the identical switching, transport, and signalling functions of access facilities, not just separately, but *in combination*, were critical, in the agency's view, to the success of its plan.[10] Without them, the development of local exchange and exchange access competition would be unlikely on a widespread basis.

The Commission acknowledged that it would have to step in and prescribe forward-looking economic prices for the access service elements in the absence of "substantial competition in exchange access."[11] The agency did not want to prejudge the effectiveness of the 1996 Act in creating such competition in exchange access services by prescribing such rates initially.[12] The reality is now inescapable that unbundled network elements will not be readily available in combination for some indefinite period, if ever. Accordingly, while the need to drive access charges to economic cost remains, the vehicle by which the Commission hoped to accomplish that objective has disappeared. Even were the Supreme Court to reinstate the Commission's rules on the availability of UNE combinations, it is unlikely to do so for more than a year, given that oral argument is scheduled for October, 1998.

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[9] *Access Charge Reform Order*, ¶ 262.

[10] *Id.*

[11] *Id.*, ¶¶ 265, 269.

[12] *Id.*, ¶ 269.

B. Even if the Eighth Circuit Decision is Reversed, Market Pressures Are Unlikely to Drive Access Charges to Cost Levels

As noted above, the Eighth Circuit's opinions undermine the Commission's efforts to establish the basic elements of local competition, and thereby remove the means anticipated by the Commission for bringing access rates down to cost-based levels. However, even if ILECs are ultimately required to offer UNEs as pre-existing combinations — *e.g.*, if the U.S. Supreme Court reverses the Eighth Circuit — access competition is unlikely to emerge so as to lower rates for terminating and tandem-switched access to forward-looking cost levels.

Currently, in most cases, the calling party chooses its interexchange service provider, which has the incentive to offer attractive prices to the caller. But this relationship does not provide any incentive for the terminating access carrier, which typically is *not* chosen by the calling party, to lower its charges to the interexchange service provider.[13] Similarly, when local competition develops, the local exchange carrier's incentive to lower the total charges for its service to the caller will fail to place any downward pressure on the rates that these LECs will charge third-party IXCs for access. Because terminating access is thus insulated from any realistic competitive pressures, even if preexisting combination obligations are reinstated, prescriptive regulatory action is absolutely essential to drive terminating access charges to cost-based levels.

Switched transport evinces a different dynamic. In a number of geographic markets, competitive carriers today provide high-capacity dedicated interoffice transport, and so

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[13] In its *Local Competition Order*, the Commission reached the same conclusion: "While, on the originating end, carriers have different options to reach their revenue-paying customers . . . they have no realistic alternatives for terminating traffic destined for competing carriers' subscribers other than to use those carriers' networks." FCC Rcd. 15499 (¶ 1058).

arguably provide at least some downward pressure on direct-trunked transport rates. At present, however, no carrier provides competitive tandem switching or tandem-switched transport, and effective competition is not likely to develop in this market segment in the foreseeable future. As a result, rates for tandem switching and *both originating and terminating* tandem-switched transport will not be brought down to cost-based levels absent prescriptive regulatory action.

For non-tandem switched originating access and direct-trunked transport, it is still unclear whether market forces will be adequate to bring rates to cost-based levels. CompTel believes the Commission should examine, in light of the Eighth Circuit's decision and the timing of Supreme Court review, whether the preconditions for market pressure will exist to bring non-tandem switched originating access and direct trunked transport down to cost-based levels in an acceptable time frame. However, should the Supreme Court fail to reverse the Eighth Circuit decision, the need for affirmative Commission action as to non-tandem switched originating access and direct trunked transport will be clear.

C. CompTel's Proposal

CompTel proposes that rates for terminating access and tandem switched transport be set immediately at their State commission-derived unbundled network element equivalents. In addition, the Commission should retain the ability, on its own motion or in response to petitions, to find that use of a state-established unbundled element rate to set an *interstate* rate in this manner is not just and reasonable or is discriminatory. In cases where no such state-established rate exists or where the Commission finds the UNE rates are inappropriate as interstate access charges, the Commission has several alternatives in prescribing rates. For example, the Commission could use the state-specific proxies adopted in its *Local*

Competition Order. Alternatively, if the Commission determines a proxy rate is not a suitable surrogate, then it should prescribe rates based on TSLRIC/TELRIC studies. Only if the Commission acts affirmatively in this way can it, in the present circumstances, ensure that access charges move to a forward-looking cost basis.

While the Commission, as long as it determines State-established UNE rates reflect forward-looking economic costs, will not be setting rates directly, the FCC will retain jurisdiction to adopt different *interstate* access rates that differ from UNE levels, if necessary. Thus, the Commission would *not* under CompTel's proposal be giving the states authority to set interstate access rates. Rather, the Commission will have made a determination that *interstate* access elements in a given state from a given ILEC should be priced at a level equal to functionally equivalent unbundled network elements.[14] To ensure that the rates established in this way are just and reasonable, the Commission must satisfy itself that

* the unbundled network element rates on which the access charges would be based reflect an arbitrated result or are the result of a general costing docket in the State;

* the unbundled network element rates reflect the State's determination of forward-looking efficiently incurred incremental costs, consistent with the principles set out in the *Local Competition Order* (*i.e.*, total element or total service long run incremental costs);

* the rates do not discriminate among carriers using the same network facilities; and

* the rates do not recover costs in excess of separations results for the interstate jurisdiction.

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[14] There can be no remaining doubt that access charge elements and unbundled network elements are functionally identical uses of the network. ILECs in the recent comment cycle in separations restated that the facilities used are common to access and UNEs. *See, e.g.*, Comments of GTE at 4-5, filed in Docket No. 80-286 (Dec. 10, 1997); Comments of U S WEST at 7, filed in Docket No. 80-286 (Dec. 10, 1997).

Notably, CompTel is not suggesting here that *intrastate* access charges must be set at similar levels. States must, as now, be free to set intrastate charges as they determine appropriate, taking into account separations results and other factors to the extent they are required by State law. CompTel believes, however, that intrastate access charges should over time be brought closer to economic cost levels and, in principle, should move closer to both unbundled network element prices as well as interstate access rates. CompTel submits that its proposal regarding *interstate* access charges, if adopted, will eventually succeed in bringing about this desirable result. But for purposes of this proceeding before the Commission, it is sufficient to note that it leads to the right result for interstate access charges.

CompTel's proposal is not intended to encompass rates for non-tandem switched originating access or direct trunked transport. There may be some basis for concluding that these elements will be subject to market pressures sufficient to bring them to forward-looking cost levels, provided the availability of preexisting combinations of UNEs to requesting carriers is reinstated by the U.S. Supreme Court. The Commission should consider whether the lengthy period prior to the Supreme Court's review of the Eighth Circuit decisions will frustrate the effectiveness of market forces to bring originating access and direct-trunked transport to cost-based levels in a timely fashion. In the event the Commission's rules on preexisting combinations are not reinstated, however, the Commission must prescribe the rates for all originating access and direct trunked transport in the manner outlined above.

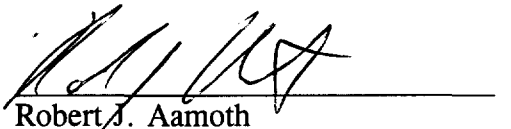
IV. CONCLUSION

For the foregoing reasons, the *CFA Petition* should be granted to the extent described herein and a proceeding should be instituted to prescribe access charges at rates equivalent to

rates for corresponding unbundled network elements, with the exception of non-tandem switched originating access and direct trunked transport. In light of the considerable differences between current access charges and rates that would reflect forward-looking, efficiently incurred costs, the Commission should act expeditiously to avoid the adverse consequences of this price differential. If the Supreme Court affirms the Eighth Circuit's decision on the unavailability of preexisting combinations of UNEs under Section 251(c)(3) of the Act, the Commission should prescribe charges for all originating access and direct trunked transport as well.

Respectfully submitted,

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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January 30, 1998

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Comments of Competitive Telecommunications Association were served January 30, 1998, by hand delivery or U.S. mail, postage prepaid, upon the following:

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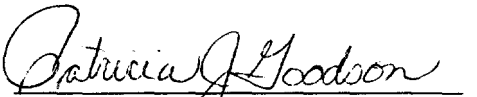

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